IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 25TH JULY 2007 / 3RD SRAVANA 1929

RSA.No. 651 of 2007()

AS.49/2005 of SUB COURT, NEDUMANGAD
OS.290/1998 of ADDL.MUNSIFF COURT,NEDUMANGAD

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APPELLANTS : APPELLANTS/DEFENDANTS:

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1. KARTHIYAYANI LALITHA,
PLAVILA VEEDU,PAZHAYATHERUVU MURI,ARYANADU VILLAGE

2. VIJAYACHANDRAN,
PLAVILA VEEDU,PAZHAYATHERUVU MURI,ARYANADU VILLAGE

BY ADV. SRI.M.BALAGOVINDAN
SRI.M.R.SASITH

RESPONDENTS: RESPONDENT:PLAINTIFF

KARTHIYANI LALITHA BAI,
SARASWATHY VILASOM, NARAYANAPURAM,
THEKKUMKARA MURI.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 25/07/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A NO. 651 OF 2007

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Dated this the 25th day of July, 2007

JUDGMENT

Defendants in O.S.290/1998 on the file of Additional Munsiff Court, Nedumangad are the appellants. Plaintiff is the respondent. First appellant and respondent are direct sisters. Plaint schedule property originally belonged to the father. Under Ext.A1 sale deed dated 22.2.1978 appellant and the mother sold their right in favour of first respondent. First respondent thereafter filed O.S.71/1990 before Munsiff Court,Nedumangad for evicting appellants alleging that first appellant is a tenant. First appellant filed O.S.729/1989 before the same court for a declaration that she has a kudikidappu right in the plaint schedule property and for a permanent prohibitory injunction restraining respondent from interfering with her peaceful possession. Both the suits were jointly tried O.S.71/1990 was dismissed

holding that tenancy was not proved. O.S.729/1989 was partly decreed holding that respondent is entitled to evict appellants only by due process of law. The common judgment was challenged before first appellate court in A.S.41/1992 & 42/1992. Confirming the decree granted by the trial court, both the appeals were dismissed. It was challenged before this court in Second appeal. This court also dismissed the appeal but observed that respondent is entitled to institute a suit for recovery of possession of the building, on the strength of title. It is thereafter O.S.290/1998 seeking a decree for recovery of possession was instituted. Appellants resisted the suit contending that under Ext.A1 respondent did not get title to the property and Ext.A1 was executed as security for the amount borrowed and in any case title of the respodnent is barred by adverse possession and suit is also barred under Rule 2 of Order II of C.P.C. Learned Munsiff on the evidence found that the suit is not barred under Order II Rule 2 in

view of the fact that former suit was based on the claim of tenancy in favour of first appellant and this court in the second appeal granted liberty to respondent to institute a first suit for recovery of possession on the strength of tile. The claim of appellants that Ext.A1 was executed as security was also rejected holding that Ext.A1 is a sale deed and first appellant herself executed the sale deed along with the mother. The claim for adverse possession was rejected on the ground that first appellant herself had claimed kudikidappu right and filed O.S.729/1989 for a declaration of kudikidappu right recognising the right of the respondent. A decree for recovery of possession was granted. Appellants challenged the decree and judgment before Sub Court, Nedumangad in A.S.49/2005. Learned Sub Judge reappreciating the evidence confirmed the findings of the learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

2. Learned counsel appearing for appellants

was heard.

3. The argument of learned counsel was that as the suit is barred under Order II Rule 2 of C.P.C, as plea for recovery of possession on the strength of title was available on the date when O.S.71/1990 was instituted earlier. It was also argued that Ext.A1 sale deed was executed only as a security and was not a transfer of the right and title to the respodent and therefore the decree is unsustainable.

4. On hearing the learned counsel, I do not find any substantial questions of law involved in the appeal.

5. Appellants recognising the right of the respondent instituted O.S.729/1989 earlier for a decree for declaration of their right as against the respondents. In such circumstances they cannot dispute the title of the respondent. Moreover, under Ext.A1 executed by first appellant herself, along with the mother, their title has been divested and now it vests with the respondent.

Therefore title of the respondent cannot be disputed.

6. Though O.S.71/1990 was earlier filed for recovery of possession on the contention that the building is in the possession of the first appellant as a tenant, tenancy was not proved. That suit was jointly tried along with O.S.729/1989 filed by the appellants. In that common judgment a decree for injunction was granted in favour of first appellant to the effect that respondent is not entitled to evict appellant other than by due process of law. Though it was challenged before first appellate court as well as this court, the decree was confirmed. This court granted liberty to respondent to institute a fresh suit for recovery of possession on the strength of title. The plea that second suit filed is barred under Order II Rule 2 of C.P.C. is therefore not sustainable. Having admitted the title of the respondent in 1989, the plea for adverse possession will not lie and was rightly rejected.

As no substantial question of law is involved, appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006